SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 279

MARGARET WITHROW, TRADING AS ROYAL BLUE CAB COMPANY, AND GEORGE A. BUTTS,

Petitioners.

vs.

WILMA FARMER EDWARDS, ADMINISTRATRIX OF THE ESTATE OF WILLIAM ALEXANDER EDWARDS, DECEASED.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

SUPPORTING BRIEF ON BEHALF OF THE PETITIONERS.

Judgments and Opinions of the Courts Below.

The judgment of the Circuit Court of Warwick County, Virginia, is found in the printed record at page 28.

The original judgment of the Supreme Court of Appeals of Virginia will be found in the printed record at page 112. The original opinion of said court is found in the printed record at page 112, and is reported in 181 Va. 344, 25 S. E. (2nd) 343.

The judgment of said court on rehearing is found in the printed record at page 121. The opinion of said court on rehearing is found in the printed record at page 122, and is reported in 181 Va. 592, 25 S. E. (2nd) 899.

It will be noted that on rehearing the court adhered to its original decision of the question involved here, namely that the child Betty Jean Edwards is legitimate, and as such a beneficiary; and the decision of that question is final so far as concerns the Virginia courts. Petition for certiorari to this Court at this time is made under *Department of Banking, etc.* v. *Pink*, — U. S. —, 63 S. Ct. 233, 87 L. Ed. 218.

Concise Statement of the Grounds Upon Which the Jurisdiction of This Court Is Invoked.

The case is here on petition for writ of certiorari to The Supreme Court of Appeals of Virginia under authority of U. S. C. A. Title 28 Section 344 (b). It is our contention that the application of Section 5270 Code of Virginia to the facts of this case is repugnant to the full faith and credit clause of The Constitution of The United States.

Williams v. *North Carolina*, — U. S. —, 63 S. Ct. 207, 87 L. Ed. 189;
In re Morris Estate (Cal. 1943), 133 Pac. (2nd) 452.

Concise Statement of the Case.

In 1933 William Alexander Edwards was married to one Marie Carter in South Carolina. Neither party obtained a divorce, and there was no dissolution of that marriage, and Marie Carter is still living. In 1937 said William Alexander Edwards and one Wilma Farmer went through a marriage ceremony in South Carolina. The child Betty Jean Edwards was born in South Carolina in 1938 of that Edwards-Farmer void marriage. At the time of all the

above occurrences all the contracting parties were domiciled in South Carolina. Hence it will be noted that the child was born in South Carolina of a void marriage, of parents who were then domiciled in South Carolina.

In August, 1941, Mr. Edwards and Wilma Farmer moved to Virginia, where Mr. Edwards was killed in an automobile accident in December, 1941, while riding as a passenger in a cab owned by the petitioner Margaret Withrow and operated by the petitioner George A. Butts.

This action was brought under the death by wrongful act statute of Virginia (Code of Virginia 1936—Sections 5786-5788), to recover damages for the death of Mr. Edwards. The statute provides that the beneficiaries of such a recovery shall be "the surviving widow or husband and children and grandchildren of the deceased," in such proportions as the jury may award. The child Betty Jean Edwards was held to be a legitimate child of the decedent, under Section 5270 Code of Virginia, and as such she was allowed to share in the recovery.

Assignments of Error.

1. The Court erred in holding that the child Betty Jean Edwards was a legitimate child of William Alexander Edwards, and as such entitled to share as a beneficiary in the recovery.

2. The Court erred in refusing to grant a new trial on all the issues.

Summary of Argument.

The State of South Carolina established and fixed the status of the child Betty Jean Edwards as an illegitimate.

Illegitimacy is a status of a permanent nature, and when once fixed, follows the individual wherever she goes.

Section 5270 Code of Virginia should be construed, not by itself, but in the light of the true principles of Conflict

of Laws and the full faith and credit clause of The Constitution, which are as much parts of the body of the law of Virginia as Section 5270.

So construed Section 5270 Code of Virginia has no application to the child Betty Jean Edwards, for the reason that the section simply purports to establish a status at birth, and nothing more. It does not purport to change a status already fixed by the law of South Carolina. Section 5270 could not have any application to the child at birth, for the reason that she was born in South Carolina of parents domiciled in South Carolina at the time of the birth. The Virginia Court in holding that Section 5270 Code of Virginia is applicable has failed to give full faith and credit to the act of South Carolina in fixing the status of the child as an illegitimate.

The word "children" as used in the death by wrongful act statute designating the beneficiaries, means legitimate children only, and excludes illegitimate children.

ARGUMENT.

The State of South Carolina Established the Status of the Child as an Illegitimate.

It will be noted that the child was born in South Carolina of parents then domiciled in South Carolina. The authorities are all agreed that the law of the domicile of the parents at the time of the birth is the controlling law in the establishment of the status of legitimacy or illegitimacy. Beale on Conflict of Laws, Section 138, 1, page 704. Restatement, Conflict of Laws, Section 138, page 205. Minor on Conflict of Laws, Section 97.

It will also be noted that the child was born of a void marriage. The full rigors of the common law on the subject apply in South Carolina, that state having no legitimat-

ing statute. So much is conceded in the opinion of the Virginia Court in the instant case (R. 113):

> "It is conceded that, under the laws of South Carolina, Betty Jean Edwards is illegitimate * * *."

Section 6192a Code of Virginia provides that in any case where it becomes necessary to ascertain the law of another state, whether statutory or otherwise, the judge shall take judicial notice thereof.

Illegitimacy Is a Status of a Permanent Nature, and When Once Fixed, Follows the Individual Wherever She Goes.

This proposition is argued at some length in our petition for writ-of-error contained in the printed record pages 5-16. Inasmuch as the opinion of the Virginia court in this case concedes that as a general rule the principles are applied in many jurisdictions, we will content ourselves by quoting from the opinion in the case at bar, and citing other authorities (R. 113):

> "Defendants contend that the status of illegitimacy is of a permanent nature and, when once fixed, follows the individual into any State into which he may go. Story on Conflict of Laws, 8th ed., sec. 93, states: 'Foreign jurists * * * generally * * * maintain that the question of legitimacy (fol. 116) or illegitimacy is to be decided exclusively by the law of the domicile of origin.' The principle is stated in the Restatement of the Law (Conflict of Laws, sec. 138) as follows: 'The legitimate kinship of a child to either parent from the time of the child's birth is determined by the law of the State of domicile of that parent at that time.' Other authorities cited by defendants to the same effect are: Smith *v.* Kelly, 23 Miss. 167, 55 Am. Dec. 87; Irving *v.* Ford (Mass.), 67 N. E. 366; Minor on Conflict of Laws, sec. 97; Beale on Conflict of Laws, sec. 138.1.

> "It may be conceded that, as a general rule, the foregoing principle is applied in many jurisdictions."

Other authorities to the same effect are:

Moore v. *Saxton* (Conn. 1916), 96 Atl. 960 at p. 962;
Fowler v. *Fowler* (N. C. 1902), 42 S. E. 563;
In Re Presley (Okl. 1924), 240 Pac. 89;
Eddie v. *Eddie* (N. D. 1899), 79 N. W. 856, 73 Am. St. Rep. 765;
Pfeifer v. *Wright* (10th Cir. 1930), 41 F. (2d) 464, 73 A. L. R. 932, certiorari denied, 282 U. S. 896.

It will be noted that the Virginia opinion says that it may be conceded that as a general rule the foregoing principles are applied in many jurisdictions. We go further and make the assertion that no adjudicated case can be found outside the instant case in which the above principles of Conflict of Laws have been denied. Certainly none has been cited either in the opinion or in the brief of our opposing counsel. While the court recognizes the principles, the opinion proceeds to cast them aside on the basis of certain cases which as we will hereinafter show are not applicable. The decision of the instant case stands alone.

Criticism of the Opinion of the Virginia Court in the Case At Bar.

The opinion (R. 113) states what it considers the dominant question involved:

> "The dominant question presented is whether the law of the state of birth, which fixes the status of the child as illegitimate, or the law of the domicile of the decedent at the time of his death, shall be applied."

That statement is confusing. If it is meant that the dominant question is—what state furnishes the law to determine the status of the child as being legitimate or il-

legitimate, the statement is correct. If on the other hand the meaning is—admitting that the child is illegitimate, what State furnishes the law to determine whether an illegitimate child is entitled to be a beneficiary of the recovery, then the court has entirely misconstrued the issue, because as to this latter proposition there is no dispute.

We admit that the question as to whether the child is a beneficiary, either under the death by wrongful act statute or the statute of descents and distribution, is controlled by the law of Virginia, the state of the domicile of the decedent at the time of his death. What the court has failed to keep in mind is that the true principles of Conflict of Laws and the full faith and credit clause of the Constitution of The United States is as much a part of the law of Virginia as Section 5270 of The Code; and hence the Virginia Statute must be read in the light of the true principles of Conflict of Laws and the full faith and credit clause of The Constitution.

Under the law of Virginia, the question as to whether a child is a beneficiary under either statute depends upon the status of relationship between the child and the decedent; that is whether the child is a legitimate or illegitimate child of the decedent under the law of Virginia, including the true principles of the law of Conflict of Laws and the Constitution of the United States, as well as Section 5270 of The Code of Virginia. Under the true principles of Conflict of Laws, the permanent status of the child was fixed at birth as an illegitimate by the law of South Carolina. Under the full faith and credit clause of The Constitution, the Virginia court is required to give full faith and credit to the act of South Carolina in establishing the status of the child. Such the Virginia court has failed to do, and thereby has failed to apply its own law. Specifically what the Virginia court has done is to construe Section 5270 as if it

stands alone; and has failed to read it in the light of the true principles of Conflict of Laws and the full faith and credit clause of The Constitution, which are a part of the body of the law of Virginia.

Immediately following the next to the last quotation above, the opinion reads: (R. 113)

> "However, the right of a child born out of wedlock, to inherit or share in the distribution of an estate, is determined by the application of two well settled principles."

Those two principles as stated in the opinion are, first that real estate descends according to the law of the situs of the real estate, and second that personal property is distributed according to the law of domicile of the decedent. We have never questioned either of those principles.

In the instant case the decedent is said to have been domiciled in Virginia at the time of his death, and hence his personal estate is to be distributed according to the law of Virginia. Under the law of Virginia only a legitimate child can take. The question of whether the child is legitimate depends upon a true construction of Section 5270 of the Code, when read, not by itself, but in the light of all the law of Virginia, including the true principles of Conflict of Laws, and the full faith and credit clause of The Constitution of The United States, which are a part of the body of Virginia law.

The opinion then proceeds (R. 114):

> "With these principles in mind, we consider the controlling Virginia Statute (Code Sec. 5270)."

The statute is as follows:

Section 5270. Issue legitimate, though marriage null.

> "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

The opinion proceeds to show that the statute was originally a part of the statute of descents and distributions. Instead of such being an inference in favor of the decision, it seems to us quite the contrary, in that it is a clear recognition of the proposition that only a *legitimate* or *legitimated* child shall inherit.

The question is—has the child been legitimated by Section 5270 Virginia Code. The language of the statute is perfectly clear. It purports to establish the status of legitimacy at birth, and nothing more. It does not purport to change a status already established. If the Virginia statute had no authority to establish the status at birth, then it does not purport to change the status that was established at birth under the applicable law of South Carolina. It seems also clear that the Virginia statute could not have had any extraterritorial effect reaching out into South Carolina to establish at birth the status of a child born in South Carolina of parents then domiciled in South Carolina.

If it is true, as we contend, that the principles of Conflict of Laws or Private International Law are a part of the body of the law of Virginia, then the Virginia statute should be read in the light of the applicable principles of Conflict of Laws. Those principles are stated by Mr. Minor in his Conflict of Laws, as follows: Page 212

> "Both legitimacy and adoption are instances of *permanent* and *universal status* (as opposed to that which is merely *temporary* and *local,* as in the case of guardianship, etc.). It would be in the highest degree inconvenient if a status of this sort, once established, were liable to fluctuation and change with time, place, or circumstance. Hence, when these relations are once established by 'the proper law,' they remain in general fixed and unchangeable, into whatsoever countries the parties may wander, or wheresoever the question may arise, subject only (in rare cases) to the exceptions enumerated in the second chapter.

> "It is a corollary of this principle that it is the proper law *at the time of the act or circumstance* upon which is based the claim of legitimacy or adoption, that is to determine the status. For since the claim is based on the act or circumstance in question, and since, if such act or circumstance does *by the proper* law create the status, that status will be permanent and unchangeable, it must follow that the law *at that time* properly applicable must determine finally the effect of the act or circumstances upon the status of the persons concerned."

Then Mr. Minor deals with Section 5270 of the Code as follows: Page 213:

> "At common law, if the marriage is void *per se* or declared void by a competent court, the issue is bastardized. But in many States, statutes have been passed abating the rigor of the common law in this respect, and declaring the issue of such marriages legitimate. It is important to ascertain what effect such statutes will have upon the status of the children of void or voidable marriages, when the question arises in a foreign State.
>
> "The general rule being that the law of the domicile regulates the status, if the father, mother, and child are all domiciled at the time of the child's *birth* in the same State, the law of that State will fix the status. It is the law of the domicil at the time of the child's *birth* which controls, for the claim of his legitimacy is based upon the circumstance of his *birth in wedlock* (though unlawful)."

Note that the text especially refers to statutes similar to Section 5270, and declares that it is the law of the domicile of the parents at the time of the birth that controls, because under the statute the claim of legitimacy is based upon the circumstance of his birth in wedlock, though unlawful. That statement of Minor is in accordance with the statements as laid down in Beale on Conflict of Laws and

American Law Institute—Restatement of the Law on Conflict of Laws, quoted on pages 8-9 of the Record. It is also the law as laid down in the following cases:

Moore v. *Saxton* (Conn., 1916), 96 Atl. 960.
Fowler v. *Fowler* (N. C., 1902), 42 S. E. 563.
Smith v. *Kelly* (Miss.), 55 Am. Dec. 87.
In re Presley (Okl., 1924), 240 Pac. 89.
Eddie v. *Eddie* (N. D., 1899), 79 N. W. 856, 73 Am. St. Rep. 765.
Irving v. *Ford* (Mass., 1903), 67 N. E. 366.
Pfeifer v. *Wright* (10 Cir., 1930), 41 Fed. (2nd) 464, 73 A. L. R. 932, certiorari denied 282 U. S. 896.

In the appendix to this brief we copy two other statutes of Virginia, with pertinent comment, throwing some light on the construction of Section 5270.

Cases Cited in the Opinion of the Virginia Court in the Case At Bar.

None of the cases cited in the opinion sustain the holding, that the child in this case is legitimate or has been legitimated. In none of the cases cited was there any question of Conflict of Laws involved similar to the question involved in the instant case. The question involved in each of the cited cases was simply whether the statute applied to an *adulterine bastard*. Under the common law a bastard could not be legitimated. Under the civil law, the law of Scotland and the Code Napoleon, any bastard other than an *adulterine bastard*, could be legitimated. But under the last mentioned system it was held that it was against public policy and good morals to allow an *adulterine bastard* to be legitimated. It was contended in all the cases cited in the opinion to sustain the decision that public policy and good morals required the court to read into the legitimating statute an exception as applied to an adul-

terine bastard, and that it was the intention of the legislature of Virginia to adopt the civil law rule on the subject. The cases cited decide against that claim, holding that there is to be no exception to be read into the statute, and that an *adulterine bastard* can be legitimated on the same basis as any other bastard. We have never made any claim to the contrary in the case at bar.

For a discussion of the Old Virginia cases see *Evatt* v. *Mier*, 114 Ark. 84, 169 S. W. 817, L. R. A. 1916 C 759.

Leonard v. *Braswell*, 99 Ky. 528, 36 L. R. A. 709 (Record-117).

In that case, one Charles Braswell, having incurred the displeasure of his father, left his home in Lyons County, Ky. and went to Memphis, Tenn., where he married a woman. He subsequently left her and returned to his father's home in Kentucky, where he succeeded in winning the affections of a second woman, whom he married in Illinois. Immediately after the second marriage (a bigamous marriage), Charles Braswell and his second wife returned to Lyons County, *Kentucky*, where they lived for many years, and *where the two children were born.* Kentucky had practically the same statute which is Section 5270 Code of Virginia. The question was whether the two childdren born in Kentucky of the bigamous marriage, at the time that both their parents were domiciled in Kentucky should inherit through their father. It was held that the children were legitimate under the Kentucky statute, and entitled to inherit.

Under the true principles of Conflict of Laws no other conclusion could have been reached, than that the legitimacy of the children was established *at birth* according to the statute of Kentucky where the children were born and where their parents were domiciled at the time of the birth.

The question was of the fixing of the status at birth, and not the change of a status.

The opinion in the case at bar referring to the Braswell case says (R. 117):

> "It was contended there, as here, that the law of the law of the State where the marriage took place fixed the status of the offspring as legitimate or illegitimate and, if the marriage was null and void by the law of Illinois, the children must be held to be illegitimate wherever they go."

The court has misconstrued our position in the case at bar. We do not claim that the law of the place of the marriage is controlling. It is our claim that it is the law of the place where the child is born and the parents are then domiciled that is controlling, and that was the ruling in the Kentucky case. What was being contended for in the Kentucky case was that the statute did not apply to an *adulterine bastard*. We make no such contention in the case at bar.

Ives v. *McNicholl*, 59 Ohio State 414, 53 N. E. 60, 43 L. R. A. 772 (Record-118).

There was no question of Conflict of Laws involved in that case. The question for decision was the same as in the Kentucky case, namely whether the statute was meant to apply to an *adulterine bastard*, that is whether an *adulterine bastard* could be legitimated under the statute. The case holds that the statute applies to all bastards, whether adulterine or otherwise. We have never made an claim to the contrary.

Evatt v. *Mier*, 114 Ark. 84, 169 S. W. 817, L. R. A. 1916 C 759 (Record-118).

In reference to this case the opinion in the case at bar says that the same Virginia statute was enacted by the

State of Arkansas, without substantial change. The two statutes are as follows:

Virginia:

> "The issue of marriages deemed null in law or dissolved by a court, shall nevertheless *be legitimate.*"

Arkansas:

> "The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed *and considered as legitimate.*" L. R. A. 1916 C. p. 761.

It is submitted that the difference in the language in italics is material. Regardless of that, as pointed out in the opinion in the case at bar, the report does not indicate where the children were born. There was no question of Conflict of Laws involved in the case. The same question as involved in the Kentucky and Ohio cases was involved here, namely whether the statute applied to an adulterine bastard.

The Word "Children" or "Child" in the Death by Wrongful Act Statute Means Legitimate Children, and Excludes Illegitimate Children.

The present action was brought under the death by wrongful act statute of Virginia which is found in Sections 5786-5788 Code of Virginia 1936. As applied to the facts of this case the statute provides that the recovery shall be for the benefit of "the surviving widow or husband and children and grandchildren of the deceased."

The authorities are unanimous in holding that the terms "children" or "child" as used in such statutes mean legitimate children only, and exclude illegitimate children.

25 C. J. S. page 1117, Section 35.

Sesostris v. *Texas etc. Co.*, 147 La. 1080, 86 So. 551.

Washington etc. Co. v. *State,* 136 Md. 103, 111 Atl. 164.
Molz v. *Hansell* (Pa.) 175 Atl. 880.
Hiser v. *Davis,* 234 N. Y. 300, 137 N. E. 596.

Therefore, it is submitted that, inasmuch as Betty Jean Edwards is the illegitimate child of the decedent, she is not within the class of beneficiaries under the Virginia Statute of death by wrongful act, and is not entitled to share in any recovery.

The case of *Middleton* v. *Luckenbach S. S. Co.,* 70 Fed. (2d) 326, cited in the opinion in the case at bar (R. 120) is not in point. In the *Middleton* case the court was construing the Federal statute giving the recovery to the "decedent's wife, husband, parent, child or *dependent relative*"; and held that an illegitimate child was entitled to share under the description "dependent relative." The court did not hold that the illegitimate child was entitled to share under the description "child." The Virginia statute does not use the designation "dependent relative."

This Court Should Grant a New Trial.

If this Court holds that Betty Jean Edwards is illegitimate, and hence not a beneficiary of the recovery, then the Court should reverse the judgments of the Supreme Court of Appeals of Virginia and the Circuit Court of Warwick County, and award a new trial on all the issues. On the question of the legitimacy of the child the trial court granted plaintiff's instructions Nos. 2 (R. 101), 4 (R. 103) and 5 (R. 104), over the exceptions of the defendants; and refused defendants' instructions D, E, F, G and H (R. 105-107). Plaintiff's instruction No. 4 stated to the jury the basis and elements for her computation of the damages. By that instruction the jury was instructed to assess the damages suffered by the child Betty Jean Edwards on the basis of her being a legitimate child of the decedent. On

that basis the jury found the damages to be $10,000.00, the full amount allowable under the statute for a death, and awarded the full amount to the child. If the child is not legitimate and hence not entitled to be a beneficiary, then the basis of the jury's computation of damages has no foundation, and the Court shall grant a new trial, certainly so far as the question of damages is concerned.

Conclusion.

In conclusion, from what has been said above, it is manifest that the judgment of the Supreme Court of Appeals of Virginia should be reversed, and the case remanded for a new trial de novo.

Respectfully submitted,

JOHN S. RIXEY,
Of Counsel for the Petitioners.

RIXEY & RIXEY,
Citizens Bank Building,
Norfolk, Virginia,
Counsel for the Petitioners.